

No. 14,120

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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BENJAMIN F. RAYBORN,

*Appellant,*

VS.

EDWIN B. SWOPE, Warden, United  
States Penitentiary, Alcatraz, Cali-  
fornia,

*Appellee.*

**BRIEF FOR APPELLEE.**

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Judge Oliver J. Carter, entered on August 31, 1953, discharging an order to show cause and denying a petition for a writ of habeas corpus (Tr. 40, 41). Jurisdiction is invoked by appellant under Title 28, United States Code, 2241, 2243, 2253.

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**STATEMENT OF THE CASE.**

On March 18, 1947 appellant was sentenced upon a conviction under Section 101 of Title 18 United States

Code (Tr. 10). The indictment charged that appellant did receive, sell and have in his possession with intent to convert to his own use, property of the United States, to-wit, submachine guns which had theretofore been embezzled, stolen or purloined by another person, knowing same to have been so embezzled, stolen and purloined; and transported and shipped in interstate commerce stolen firearms and a quantity of ammunition knowing same to have been stolen, and the defendant then being a fugitive from justice. Appellant was sentenced to thirty years, to be served concurrently with a state life sentence for armed robbery, which the defendant was then serving (Tr. 10, 13). The Court further ordered that the defendant be returned to the custody of the state authorities for continuation of his life sentence (Tr. 10).

On September 11, 1952 appellant was transferred from the Kentucky State Penitentiary to the United States Penitentiary, Terre Haute, Indiana (Tr. 30). Subsequently appellant was transferred to the United States Penitentiary at Alcatraz Island, California (Tr. 32). The Kentucky authorities have placed a detainer on appellant. At the expiration of his federal sentence he will serve the remainder of his Kentucky term (Tr. 16, 31).

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#### QUESTION PRESENTED.

Is appellant's confinement in the United States Penitentiary at Alcatraz Island, California, lawful, notwithstanding the order of the sentencing Court that

he be returned to the Kentucky State Authorities for continuation of his life sentence?

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### SPECIFICATION OF ERROR.

Appellant specifies as error the following:

1. The District Court erred in holding that the transfer to Federal prison was not premature and unlawful.
  2. The District Court erred in its conclusion of law that the case of *Banghart v. Swope*, 9th Cir., 175 F. 2d 442, controls the instant case.
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### ARGUMENT.

Appellant argues that his transfer from the State to the Federal authorities, despite the sentencing judge's order that he be returned to his Kentucky confinement, was unlawful and therefore he should be discharged from custody.

In *Banghart v. Swope*, 9th Cir., 175 F. 2d 442, the District Judge had ordered the defendant to be returned to the State authorities. He later escaped from the Illinois State Penitentiary and after apprehension, was transferred by the Attorney General to the United States Penitentiary at Alcatraz Island, California. Banghart also contended that since the trial Court had fixed the place of confinement, the Attorney General had no power to remove him to Alcatraz. This Court held, however, that Section 4082 (then 753(f))

of Title 18, United States Code, deprived trial Courts of the power to designate the place of confinement, and that consequently, the Attorney General lawfully exercised his power in transferring Banghart to a Federal Prison.

Petitioner here argues that a distinction exists between Banghart's and his case. Banghart was apprehended by Federal authorities after his escape, while appellant was at all times within the confines of the State Penitentiary. In addition, he argues that the additional clause in the instant sentence, that he "be turned over to the custody of the Attorney General to complete the sentence in this case" alters the situation at bar.

In the case of *Mahoney v. Johnston*, 9th Cir., 144 F. 2d 663, the defendants were surrendered by the Louisiana authorities to the Attorney General, who confined them at Alcatraz. This Court there held that the trial judge's sentence did not and could not provide that their Federal sentence could only be served in the Louisiana State Penitentiary. "The sentence does not so read and the Court has no power to make such a commitment; it must commit the prisoner to the custody of the Attorney General, who determines the particular penitentiary for the prisoner's confinement." *Mahoney v. Johnston*, supra, at 664.

The principle is clear that under Section 4082 the Attorney General is authorized to designate the institution in which a Federal prisoner shall be confined and to order a prisoner transferred from one in-



stitution to another. *Garcia v. Steele*, 193 F. 2d 276, 278; *Stroud v. Johnston*, 9th Cir., 139 F. 2d 171, 173. The place of confinement is no part of the sentence, but is a matter for the determination of the Attorney General. *Bowen v. United States*, 174 F. 2d 323, 324.

Prior to the present section trial Courts had the power to designate the place of confinement. Since, however, the enactment of this section the place where the sentence is to be served is within the power of the Attorney General of the United States. The Attorney General has exercised that power by the confinement about which this defendant complains. It makes no difference that the trial judge ordered a transfer to be made at a later time. His order was without effect, since by law the sentence could not designate the place of confinement.

There is no question in the instant case of any arbitrary, capricious, or abusive use of the Attorney General's authority. Appellant's transfer to Federal authorities was effected following a riot at the Kentucky Prison (Tr. 18). Since there is no evidence to the contrary, we must assume that the Attorney General used proper discretion in arranging Rayborn's transfer.

**CONCLUSION.**

The United States respectfully submits that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,  
December 21, 1953.

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